United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-7400

To be argued by
RALPH R. FERNEY

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P/S

IN THE

United States Court of Appeals

For The Second Circuit

MARIAN GATEFIELD,

Plaintiff-Appellee,

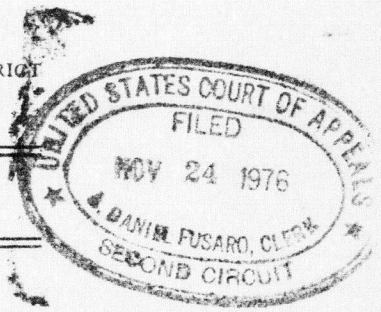
vs.

ADVANCED COMPUTER TECHNIQUES CORPORATION,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR PLAINTIFF-APPELLEE



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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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MARIAN GATEFIELD,

Plaintiff-Appellee,

vs.

No. 76-7400

ADVANCED COMPUTER TECHNIQUES CORPORATION,

Defendant-Appellant.

----------X

BRIEF OF PLAINTIFF-APPELLEE

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Does an employer meet the burden of proof of establishing cause for the discharge of one of its employees on the ground of taking an unauthorized leave of absence sufficiently to be granted judgment n.o.v. when evidence was presented at the trial that plaintiff was given a leave of absence and the granting of the leave was not revoked?

2. Can the Court of Appeals reverse the trial court's order denying defendant a new trial on the grounds that:

(a) the verdict was not against the weight of the evidence; or

(b) the newly-discovered evidence relating to immaterial issues and credibility of a witness does not warrant a new trial; or

(c) evidence concerning expenses incurred by plaintiff

in seeking new employment following termination of her employment by her employer was properly admitted and was not prejudicial?

3. Must damages suffered by a wrongfully-discharged employee be reduced by the amount of unemployment benefits received by the employee?

STATEMENT OF THE CASE

Defendant is appealing (267a) from the judgment (266a) of the trial court in favor of plaintiff in the amount of $10,115 following a jury trial and a verdict (243a) by the jury in favor of plaintiff in such amount.

Plaintiff sued her former employer, the defendant, for wrongful discharge on June 2, 1975 from the employ of defendant (279a-280a, Exhibit 4) with whom she had an employment contract (275a-278a, Exhibit 3) forbidding her discharge without cause.

After a trial before a jury in which the major issue in contention was whether plaintiff had been granted a leave of absence, the jury brought in a verdict in favor of plaintiff in the amount of $10,115 (243a) and defendant moved for (a) judgment n.o.v., (b) a new trial, or (c) reduction of the verdict for unemployment compensation (256a-257a). Judge MacMahon, in a memorandum decision and order, denied all of defendant's motions (258a-265a) and entered judgment in behalf of plaintiff on June 25, 1976 (266a), from which judgment defendant appeals (267a).

STATEMENT OF FACTS

At the trial, plaintiff presented evidence that she had an employment contract with defendant (45a-50a, Exhibit 3) and was dismissed because she commenced a leave of absence (73a/18-74a/10, 279a-280a, Exhibit 4).

She testified that when asked to work as a systems analyst on a project called the COINS project she asked for and received permission to take a two-month leave of absence beginning May 23, 1975 (51a/19-54a/20) from defendant's Executive Vice President, who was in charge of defendant's affairs while its President was out of the country (54a/8-20, 187a/25-188a/4).

Additional testimony was received to the effect that plaintiff agreed at the request of defendant's President to delay her departure for a week to complete the phase of the COINS project on which she was working (60a/23-61a/14).

On May 30, 1975, plaintiff testified, the defendant's President requested that she detain her departure for another week to make certain that her replacement for the next phase of the project would work out (68a/9-20), but plaintiff told him the replacement was competent and that she had carried out her original commitments in staying one extra week (69a/2-8). She also testified that defendant's President indicated she might go on a business trip to Zaire if she stayed for a while, but plaintiff preferred to go on the leave of absence (69a/24-25, 70a/1-12). Defendant's President then changed the subject to question whether he might have the use of her apartment while plaintiff was away, but plaintiff indicated that she already arranged for someone to live there and repeated her desire to leave (71a/2-13). Further-

more, she assured defendant's President that should any difficulties arise, she could be contacted in England (71a/13-16). This latter statement was corroborated by the testimony of defendant's President (209a/20-25, 210a, 211a/1-3).

Plaintiff testified that she had known defendant's President well for over six years (71a/24-29, 72a/1-7), and that she had not been threatened with being fired if she took her leave of absence (72a/16-20).

On Monday, June 2, 1975, defendant's President wrote plaintiff a letter terminating her employment (Exhibit 4, 279a-280a, 209a/12-16). The letter was dictated late in the morning (226a/23-24). Earlier that morning, defendant's President had received a letter of resignation from the head of the COINS project and plaintiff's replacement did not show up for work that day, so there was an obvious crisis (183a/22-25, 184a/1-21, 211a/4-7, 220a/4-13).

The secretary of defendant's President who was a personal friend of plaintiff testified she tried to telephone plaintiff to advise her she had been terminated and that plaintiff eventually talked to her on the evening of June 2 and was advised of the letter (225a/5-8). Plaintiff did not testify as to this, but she testified that after she received defendant's letter in England she believed defendant eventually would contact her since defendant's President had reneged on firing others previously (78a/5-25, 79a/1-13).

Plaintiff sent a letter concerning company insurance addressed to Jack Lowenthal, defendant's Comptroller,which was postmarked June 6, 1975 from London (Exhibit A, 284a-285a). The letter

is addressed June 1st, 1975, but plaintiff testified that she wrote it on June 5 or June 6 and pointed out that a number of items indicate she simply misdated the letter, i.e.- (1) she normally would not write to Lowenthal who does not handle benefits for defendant, but wrote to him because the letter of termination asked that she write to him, (74a/11-77a/21); (2) the letter ungrammatically (which is uncharacteristic of plaintiff) uses the phrase "to permanent" instead of "to be permanent"; and (3) the word "absence" is misspelled as "abscence" which corroborates her belief she was upset when she wrote the letter (125a/12-126a/24, 133a/9-13).

After receiving her termination notice, plaintiff sought other employment but didn't obtain employment until March 29, 1976 (80a/10-82a/23) although under the Court's charge to the jury damages were restricted to the five months of August-December of 1975 (232a/8-16).

The Court received evidence that plaintiff had not been paid for an expense report when she was terminated (82a/24-83a/21, Exhibit 6); she also did not receive certain personal property (83a/22-85a) and incurred expenses in seeking employment (85a/11-86a/20). The amount of all these expenses and unpaid items was $815 (85a/23-25, Exhibit 7).

ARGUMENT

I.

There Is No Basis To Grant Defendant Judgment N.O.V.

A. General legal standard

The general legal standard in determining a motion for judgment n.o.v. is whether the party winning the verdict presented sufficient evidence at the trial to justify the verdict as a matter of law. To be granted judgment n.o.v., a party must show that evidence submitted in support of the verdict is insufficient as a matter of law to support the verdict.

This Court of Appeals stated in Sotell v. Maritime Overseas, Inc. 474 F.2d 794 (2d Cir. 1973), at page 796, that

> "In order to prevail in this argument, however, he must show either that there was no evidence on the point or that the evidence, when viewed in the light most favorable to the appellee, would be such that reasonable men could not find for the defendant, Fortunato v. Ford Motor Co., 464 F. 2d 962, 965 (2 Cir.), cert. denied, 409 U.S. 1038, 93 S. Ct. 517, 34 L. Ed. 2D 487 (1972); Compton v. Luckenbach Overseas Corp., 425 F. 2d 1130, 1132 (2 Cir.) cert. denied, 400 U.S. 916, 91 S. Ct. 175, 27 L. Ed. 2d 155 (1970); Armstrong v. Commerce Tankers Corp., 423 F. 2d 957, 959 (2 Cir.) cert. denied, 400 U.S. 933, 91 S. Ct. 67, 27 L. Ed. 2d 65 (1970)."

B. Standard when proponent has burden of proof

The trial court properly charged the jury that, "On the element of whether there was just cause for discharging (plaintiff), in the event that you find there was a contract, the defendant has the burden of establishing the fact of just cause." (241a/4-7). This clearly has been the law of New York concerning the burden of proof in wrongful discharge cases since 1891 (Linton v. Unexcelled Fireworks, Co., 134 N.Y. 533 (1891)) and must be applied

by Federal courts in diversity cases (Cities Service Oil Co. v. Dunlop, 308 U.S. 208 (1939) as an offshoot of the Erie doctrine.

The rules for determining motions for judgment n.o.v. and motions for directed verdicts are identical. It is rare that a party with the burden of proof on a principal issue is entitled to a directed verdict. In this case, defendant, to prevail, must not only show that there was no evidence (or no evidence believable by reasonable men) indicating that plaintiff was granted a leave of absence, but must also show that the evidence against plaintiff was overwhelming and that the only possible inference from all evidence favorable to plaintiff is that she was not granted a leave of absence.

In Mihalchak v. American Dredging Company, 266 F. 2d 875(3rd Cir. 1959), cert. denied, 361 U.S. 901 (1959), the Court stated, at p. 877, that:

> "Yet though a motion for directed verdice in favor of the proponent of an issue is cast in the same form as when made by the defending party, it requires the judge to test the body of evidence not for its insufficiency to support a finding, but rather for its overwhelming effect. He must be able to say not only that there is sufficient evidence to support the finding, even though other evidence could support as well a contrary finding, but additionally that there is insufficient evidence for permitting any different finding. The ultimate conclusion that there is no genuine issue of fact depends not on a failure to prove at least enough so that the controverted fact can be inferred, but rather depends on making impossible any other equally strong inferences once the fact in issue is at least inferable."

See also, Grey v. First National Bank in Dallas, 393 F. 2d 371 (5th Cir. 1968),cert. denied 393 U.S. 961 (1968)).

C. There is ample evidence to support the jury's finding that plaintiff was given a leave of absence.

Judge MacMahon's decision (258a-264a) denying defendant's motion for judgment n.o.v., new trial, or reduced verdict succinctly and aptly summarizes the material evidence presented at the trial. Clearly, there was not only sufficient, but ample, evidence to show that plaintiff had been granted a leave of absence.

Plaintiff testified that, when asked to work on the COINS project, she specifically asked Oscar Schachter, defendant's Executive Vice President, for a leave of absence beginning on May 23, 1975 (51a/19-54a/20), and that Schachter agreed to this proposal (53a/11-12). Schachter was in charge of defendant's affairs while defendant's President, Charles Lecht, was out of the country(54a/8-20), even according to Schachter's own testimony (187a/25-188a/4).

This evidence alone justifies the verdict in favor of plaintiff especially in view of the fact that defendant had the burden of proof to establish discharge for cause. In fact, as Judge MacMahon points out, Schachter's own testimony corroborates plaintiff's testimony in that he conceded plaintiff might have some "time off" after the phase of the project she was working on was completed and often gave leaves of absence(150a/3-151a/12,188a/16-20). After Lecht returned to the United States, plaintiff agreed to postpone her leave for a week (60a/23-61a/14) and she testified that her phase of the project was completed on May 23, (59a/11-14) and a new person (Mr. Rosen) satisfactory to Mark Messenger, the project leader, had been hired to work on the next

succeeding phase of the project as a replacement for plaintiff (66a/15-68a/6).

In fact, the only basis of any significance that defendant presents to justify a judgment n.o.v. is that plaintiff testified that Lecht requested that she delay her leave for one week pending a determination as to Mr. Rosen's capabilities (68a/9-20).

There are two extremely good reasons why this testimony does not enhance defendant's position!

First, even if Lecht had asked plaintiff not to leave for a week, plaintiff would have been justified in leaving because she had been granted the leave, had worked on the project as agreed, a replacement had been found and plaintiff had made her plans to leave at that time (68a/2-8). This justification is especially true when it is remembered that defendant had the burden of proof. Mr. Messenger was not called to take issue with any of plaintiff's testimony and no evidence was introduced relating to normal practices concerning leaves of absence. In fact, there was evidence that it was common to grant leaves (188a/16-20).

Second, based on plaintiff's testimony which must be believed, she was <u>not</u> ordered not to take a leave. Plaintiff's testimony on cross examination (126a/25-127a/13, 130a/7-12) shows how she refused to have words put in her mouth indicating that any imperative order was given. She also testified she had no basis to believe she would be fired if she took the leave

(71a/19-23, 72a/16-20, 130a/13-17). Instead she referred to her previous testimony on direct examination (127a/12-13) in which she testified as to the full story of her conversation with Lecht on May 30, 1975 (68a/9-72a/20).

Common sense and everyday experience indicate that plaintiff's version of the discussions between herself and Lecht is entirely reasonable and believable. It must be remembered that she had worked closely with Lecht for over six years and knew him well (71a/24-72a/20). She would know whether she had reason to fear for her job or not.

Also, her statement to Lecht that Lecht could contact her in England if there was any problem (71a/13-16) which even Lecht grudgingly conceded had been made (209a/20-211a/3) indicates that plaintiff was not simply walking away from her job and that she had good reason to believe that if there were problems she would be contacted instead of being summarily discharged.

Finally, the other events that occurred on June 2, 1975 (the Monday following the day plaintiff and Lecht had their discussion) certainly allow a basis in fact to make a reasonable conjecture that Lecht decided to fire plaintiff in a fit of rage or as a tactic designed to get plaintiff to obsequiously return to New York, or both. Lecht testified that he did not fire plaintiff on May 29 or 30, but on June 2, when there was a crisis. When Lecht got to the office on June 2 he was served with a notice from the COINS project leader, Mr. Messenger, that he would resign (184a/3-7, 211a/4-7). Also, Mr. Rosen, plaintiff's successor,

did not come to work that day (184a/10-15). Accordingly, late in the morning (226a/23-24), Lecht wrote the letter of termination to plaintiff. One need not overspeculate as to the real reason for Lecht writing the letter. Suffice it to say that it is highly possible that Lecht only decided to write the letter of termination after the other events occurred.

Furthermore, in any event, any instructions given to plaintiff were oral and ambiguous and could have been put in writing to make them clear, especially since Schachter is a lawyer (187a/15-24).

In Fahey v. Kennedy, 230 App. Div. 156, (1930), the Court reversed a summary judgment decision by the trial court in favor of an employer who had dismissed an employee because of his long illness pointing out that the employer should have given more clear notification to the employee of the consequences of his not going to work.

The arguments in defendant's brief that plaintiff might have been considering leaving defendant's employ, and that she should have responded to defendant's letter of termination or the Donaldson telephone call by contacting Lecht are at the most argumentative as to whether plaintiff was given the leave. Even if believed, they do not directly relate to the issue of whether the leave had been granted, and are of no relevance in considering whether judgment n.o.v. should have been granted in view of the evidence already summarized. In any event, as stated in the Sotell v. Maritime Overseas, Inc. case cited at the beginning of Point I, the Court should view all evidence in the light most favorable to plaintiff since the jury found for her.

Likewise, it is merely argumentative to point out that plaintiff might have contacted defendant immediately after being advised of her termination instead of seeking new employment. She explained that she was upset and did not really believe her termination was permanent since Lecht had rehired others whom he had terminated (uncontroverted by defendant) (78a/5-79a/13). Her explanation must be believed in view of the verdict. There was no expert opinion offered that any reasonable discharged employee would immediately contact his or her employer. Certainly, there was no legal duty to do so. In fact, plaintiff's only legal duty was to mitigate damages by seeking new employment (see subpart B of Point II of this brief). She might have been required to return to work if defendant had reneged its termination (see Levin v. Standard Fashion Co., 11 N.Y.S. 706), but this was not done.

The above summary of the evidence indicates that this case is not one of those in which a plaintiff has won a verdict by means of sympathy or by reason of having barely enough evidence to submit to the jury. It is a case in which the evidence was not only sufficient - it was almost overwhelming - especially in view of the fact that, on the primary issue, defendant had the burden of proof. To the contrary, it is submitted that any verdict for defendant could properly have been set aside on the ground that it was against the weight of the evidence. The statements on page 19 of defendant's brief that plaintiff only sued because defendant is a corporation and that "if ever justice

required..." are merely disingenuous attempts to try to create an erroneous flavor to this case in order that the Court will seek to find some ground to reverse.

D. White v. Amman offers no basis for reversal.

Defendant's brief relies largely on White v. Amman, 22 A.D. 2d 674 (1st Dept., 1964), in which the Appellate Division of the Supreme Court of New York reversed a verdict of the trial judge in favor of plaintiff which had found that plaintiff had been granted a leave of absence.

However, there are two reasons why this case is of no help to defendant:

First, there was documentary evidence, including plaintiff's log book, submitted in the White case clearly indicating that the plaintiff in that case had not been granted a leave of absence and in fact had left on his own accord. Also, the plaintiff had cashed checks which clearly had been offered as termination pay and for no other purpose. There is no comparable evidence in this case. Even the "June 1" letter which plaintiff wrote (Exhibit A, 284a-285a), the misdating of which was explained by her (74a/11-77a/21) states that plaintiff is on leave and does not indicate she had agreed to a termination. In any event, under Federal procedural rules, her explanation should be assumed to be valid.

Second, if White v. Amman had been tried in a Federal Court instead of a state court, there might have been no reversal by a Federal appeals court - depending on what evidence had been submitted in support of the leave at the trial. Unlike Federal appeals courts, the New York Appellate Division has authority

under CPLR 5501(c) to substitute its findings of fact for the trial court's findings and this is clearly what was done in the White case. The statement on page 37 of defendant's brief that there was a finding for defendant in the White case "as a matter of law" is erroneous. The Appellate Division made a new finding of fact.

It stated at 22 A.D. 2d 676 that:

> "Findings of fact contained in the decision of the trial court, insofar as they are inconsistent herewith, are reversed, and new findings of fact made as indicated herein."

E. Defendant did not comply with the requisites of Rule 50(b).

Rule 50(b) of the Federal Rules of Civil Procedure provides in effect that judgment n.o.v. cannot be granted if the moving party did not move for a directed verdict after plaintiff's evidence and at the close of the trial.

This rule has been very strictly construed and enforced despite the criticism that such construction and enforcement is unduly rigid. See, most recently, the opinion of the third circuit in Lowenstein v. Pepsi-Cola Bottling Co. of Pensauken, No.75-1628, decided May 21, 1976.

In this case, the trial judge reserved ruling on motions that defendant never made, although the trial judge apparently assumed motions for directed verdict were being made (140a/21-23, 227a/9, 244a/2-11). It is not believed that this Court will have to reach a decision on this issue since it is otherwise clear that defendant cannot be granted judgment n.o.v., but it is suggested that, in view of the above rule and decision, defendant is not entitled to judgment n.o.v.

II.

There Is No Basis For Granting A New Trial

A. There can be no reversal based on the weight of the evidence.

The trial court's opinion specifically stated that the verdict was not against the weight of evidence (263a). For all the reasons set forth in Judge MacMahon's opinion and stated in Point I in considering whether judgment n.o.v. should be granted it is clear that the verdict was reasonable and not against the weight of the evidence.

Furthermore, it has been held by this Court of Appeals that it has no power to set aside a determination by a trial judge that a verdict was not against the weight of the evidence. In Compton v. Luckenback Overseas Corp., 475 F. 2d 1130 (CA-2, 1970), the Court stated, at p. 1132:

> "Appellant is apparently arguing that we may set aside a determination by a trial judge that a verdict was not against the weight of the evidence, a proposition not accepted in this cirucit. See Portman v. American Home Products Corp., 201 F, 2d 847, 848 (2d. Cir. 1953).[2]
> ***

[2] In that case, Judge Learned Hand wrote:

> (T)here may be errors that are not reversible at all, and among those that are not are erroneous orders granting or denying motion to set aside verdicts on the ground they are against the weight of the evidence. *** (This rule) is too well established to justify discussion."

A United States Supreme Court case cited in defendant's brief, Montgomery Ward & Co. v. Duncan, 311 U.S. 243 (1940), has language at p.253 which supports the viewpoint that the ruling of a trial court in denying or granting a new trial on the basis

of the weight of the evidence cannot be overturned:

> "If so, and he (the trial judge) then refuses to set aside the original judgment, a second appeal will lie, - not from his order denying a new trial for that order, save in most exceptional circumstances, is not appealable, (see Fairmont Glass Works v. Cub Fork Coal Co., 287 U.S. 474, 481-485)"

Accordingly, the determination of Judge MacMahon concerning the weight of the evidence cannot be reversed, and the long discussion in defendant's brief concerning the June 1 letter, which in any event was explained by plaintiff (74a/11-77a/21, 133a/9-13), must be ignored.

B. The admission of testimony concerning expenses in seeking employment and unpaid expense report was proper and in any event was not prejudicial.

The testimony which defendant considers prejudicial related to expenses in obtaining new employment such as travel, typewriter rental, cost of printing resumes, etc. Inexplicably, the unpaid expense report and the summary of these expenses, totalling $815, (Exhibit 6, Exhibit 7), which were admitted at the trial (82a/24-86a/20) are not part of the Record on Appeal although by stipulation (297a) they were made part of the Record. Accordingly, the Exhibit No. 7 is set forth as an appendix to this brief.

In any event, the damages and unpaid expense report were properly admitted under New York law. First, no surprise was involved since they were part of plaintiff's supporting papers in the motion to dismiss on the ground that the amount in controversy was less than $10,000 (18a) and therefore were part of plaintiff's claim.

In addition, it was proper for the court to admit into evidence the expenses which plaintiff claimed she incurred in seeking new employment. Plaintiff had a duty to seek employment comparable to that from which she was terminated in order to mitigate damages as the trial court charged the jury (234a/3-235a/5). See Cornell v. T.V. Development Corp., 17 N.Y. 2d 69(1966), Howard v. Daly, 61 N.Y. 362 (1365).

New York's highest court stated in Den Norske Ameriekalinje v. Sun Printing and Publishing Association, 226 N.Y. 1 (1919) at pages 8-9 that:

> "The rule is of general and widespread application that one who has been injured either in his person or his property by the wrongful act or default of another is under an obligatory duty to make a reasonable effort to minimize the damages liable to result from such injury ***. Familiar illustrations of this rule are found in the requirement that one who is threatened with damages as the result of a breach of a contract of employment must make a reasonable effort to find employment elsewhere***.
>
> Then it is held as a natural corollary to this rule of duty not only that the injured party who makes a successful effort to avoid or reduce damages will be allowed to recover the expenses necessarily incurred in so doing, but also that he will be allowed to recover the expenses of a proper effort even though it proves unsuccessful."

In view of the above specific language, the case of Goldman v. City Specialty Stores, Inc., 285 App. Div. 880 (1st Dept. 1955), cited in defendant's brief, must be disregarded. That decision does not reflect what damages (e.g., damages to reputation or bodily injury), might have actually been deemed to be prejudicial and the dicta stated therein cannot stand against the clear statement of the New York Court of Appeals which specifically referred to expenses in mitigating damages for wrong-

ful discharge from employment contracts, which has frequently been cited with approval, see, e.g., Kraut v. Morgan & Brother Manhattan Storage Co., Inc., 41 A.D. 2d 19, 20 (1974).

For additional authority that such damages were properly admitted, see New York Jurisprudence, 1960 Ed., Damages, §139-140; Corbin on Contracts, §1044; and 84 ALR 171.

Furthermore, it is clear that evidence that plaintiff incurred expenses in seeking new employment can hardly be deemed to be prejudicial. It certainly is logical and to be expected that she would incur such expenses.

Finally, it is submitted that under the Erie doctrine Federal procedural law, not New York law, should be considered in deciding whether the introduction of certain evidence was or was not prejudicial. See Bernstein v. Olian, 77 F. Supp. 672 (S.D.N.Y.), rev'd. other grounds, 174 F. 2d 880 (2d Cir. 1949), cert. denied, 338 U.S. 873 (1949), where the court stated, at page 674, that:

> "However, the question as to whether the verdict should be set aside and a new trial granted is one to be determined by federal rather than by state law. Rule 59, Federal Rules of Civil Procedure, 28 U.S.C.A. following section 723c; Aetna Casualty & Surety Co. v. Yeatts, 4 Cir., 1941, 122 F.2d 350; Kaufman v. Atlantic Greyhound Corp., D.C.S.D. W.V., 1941, 41 F. Supp. 252."

C. Newly-discovered evidence concerning plaintiff's departure date is not grounds for a new trial.

The evidence which defendant claims entitles it to a new trial is that British Airways records received by defendant

after the trial indicate plaintiff may actually have left New York for London on June 3, 1975 (303a, Exhibit X) rather than on June 2, 1975 as she testified (73a/7-10).

It is suggested that, even if the British Airways records are correct, the evidence is hardly even of minor importance. The jury already had reason to believe from Donaldson's testimony that plaintiff had not yet departed to London late on June 2 (224a/23-225a/3), and the jury knew plaintiff did not travel on a scheduled flight - she used standby tickets because of her sister being a British Airways employee (73a/7-15), so whether she left late on June 2 or early on June 3 cannot be very material, since it is clear she arrived on June 3 as she testified (73a/16-17, 303a, 304a).

Actually, defendant never formally moved for a new trial and could not do so now under either Rule 59(b) or Rule 60(b) since more than ten days have elapsed since judgment was entered and defendant's had knowledge of the evidence before the judgment was entered. The only way that the evidence can be considered to be before this court is to deem that Judge MacMahon considered it in denying defendant's motion for a new trial on the basis that defendant's attorneys referred the evidence to him by letter (300a-302a) while he was considering the motion for new trial already before him.

If Judge MacMahon is deemed to have ruled on the newly-discovered evidence, his decision against granting the motion can be reversed only if he clearly abused his discretion. See Ben v. Sankin, 410 F. 2d 1060 (D.C. Cir. 1969), cert. denied, 396 U.S. 1041 (1970), Ryan v. United States Lines Co., 303 F. 2d 430 (2d

Cir. 1962), Alison v. United States, 251 F. 2d 74 (2d Cir. 1958).

In Moore's Federal Practice ¶54.08(3), at p. 59-123, the following quotation from the court's opinion in Marshall's U.S. Auto Supply v. Cashman, 111 F. 2d 140, at p.142 (10th Cir. 1940), cert. denied 311 U.S. 667 (1940), is set forth as a good summary of the appropriate rules governing newly-discovered evidence as the basis for new trials:

> "A motion for new trial on the ground of newly discovered evidence must show that the evidence was discovered since the trial; must show facts from which the court may infer reasonable diligence on the part of the movant; must show that the evidence is not merely cumulative or impeaching; must show that it is material; and must show that on a new trial such evidence will probably produce a different result."

It is submitted that the evidence here does not meet any of the tests, let alone all of them. Certainly, it is open to doubt as to whether defendant was diligent in obtaining the evidence from British Airways. The record shows the subpoena was not issued to British Airways until April 12, 1976 - two days before the trial(301a).

More importantly, however, for reasons already stated, the evidence is clearly not material. One would be hard pressed even to find it cumulative or impeaching.

The only material new evidence would be evidence relating directly on the issue of whether plaintiff was granted a leave tending to show that Lecht's and Schachter's versions of their conversations with plaintiff were the correct versions. Only such evidence would be likely to change the result of the trial. The exact timing of the departure (especially since at best only a few hours are involved) can hardly be described as material.

The discussions in defendant's brief of this "new" evidence and the letter dated June 1, 1975 and the testimony of Rosemary Donaldson cleverly try to shift the real issue of this case, which is whether plaintiff was given a leave of absence, to whether she might have been contemplating leaving defendant's employ beforehand or whether she knew she was fired even before she left for London. These facts at best are related only remotely by argument to whether plaintiff was fired for cause or not. The jury considered these arguments in reaching its verdict and Judge MacMahon considered them in deciding that the verdict was not against the weight of the evidence, so, for reasons already stated, this court cannot reconsider them as a basis for a new trial.

III.

THE JUDGMENT SHOULD NOT BE REDUCED BY UNEMPLOYMENT COMPENSATION

At the trial, in response to a question, plaintiff testified (123a/10-13) that she began receiving unemployment compensation in July. Then there was a question asking for the amount of unemployment, which was interrupted by a colloquy between counsel and the court (123a/14-22). The attorney for defendant simply did not press for an answer to his question, even though the judge had not ruled the question inadmissable, so there is nothing in the record as to the amount, and, for that reason alone, there is no basis to reduce the amount of the judgment by unemployment compensation.

All of the cases cited on page 49 of defendant's brief involve Title VII of the Civil Rights Act of 1964 under which judges have clear discretion to determine the amount of back pay and do not involve New York law and so are not relevant to this point of law. It is believed that there is only one case in which New York law has been considered. In that case, Sporn v. Celebrity Inc., 324 A.2d 71, 129 N.J. Super. 449 (1974), a New Jersey court had to decide whether discharged employee should have his damages for wrongful discharge reduced by his unemployment compensation. The court found that New York law had not decided the issue, and, therefore, it was free to make its own decision. It stated that the majority rule in the United States was not to reduce such damages and, accordingly, decided against such reductions.

Furthermore, it should be pointed out that if the verdict was to be reduced by unemployment compensation, it would be difficult to determine the amount of reduction since the amount of the

verdict ($10,115) could have been arrived at in a varying number of ways, depending on (1) whether the jury believed the operative salary of plaintiff was $25,500 or $23,000 (61a/22-63a/17, 233/17-23); (2) whether the jury believed plaintiff could have found employment with due diligence elsewhere before December 31, 1975 (234a/2-235a/5); and (3) whether the jury granted plaintiff any of the additional expenses claimed in Exhibit 7 (233a/24-234a/2).

CONCLUSION

For the reasons set forth in this brief, it is respectfully requested that the judgment of the trial court be affirmed in all respects and that defendant not be granted judgment n.o.v. or a new trial or a reduction in the amount of the judgment.

It is also requested that plaintiff-appellee be awarded costs and interest as provided by law.

Respectfully submitted,

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Exhibit 7

Expense List

(1)	Extra Air Travel to England (Discount Fare)	$175
✓(2)	Unpaid Expenses	$50
✓(3)	Property not returned. Raincoat, Briefcase, Umbrella, Sweater, Magazines, Manuals (IBM).	$300
(4)	Phone Calls	$100
	Stationary	$20
	Fares to interviews	$150
	Telephone answering machine	$90
	Entertainment	$200
	medical insurance extra	$105
	Typewriter rental	$150
	Stationary	$20
		$815
(5)	La	

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Lewis De Clevante,

Attorneys for Defendant-Appellant